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In the

Supreme Court of the United States

OCTOBER TERM 1961

No. 852

B. T. WOODARD and B. J. WOODARD
d b a WOODARD MOTOR COMPANY,
Petitioners;

v.

GENERAL MOTORS CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF OF PETITIONERS

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WARLICK PRESS INC.—2263 VALDINA STREET—DALLAS—ME 1-2130

INDEX

	Page
Argument	1-12
Conclusion	12
Proof of Service	13

CITATIONS

Cases

Bauer v. Neuzill, 66 Cal. App. 2d Supp. 1020, 152 P. 2d 47	4
Hatfield v. Barnes, S. Ct. Col., 168 P. 2d 552	4
Isbell v. Anderson Carriage Co., S. Ct. Mich., 170 Mich. 304, 136 N. W. 457	4
Sviggum v. Phillips, 217 Minn. 586, 15 N. W. 2d 109	4

Statute

Public Law 1026—84th Congress, Act of August 8, 1956, Chap. 1038, Secs. 1-5, 70 Stat. 1125, 15 USC 1221-1225	1, 2, 3, 4, 5, 11, 12

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ARGUMENT

Respondent argues that this case should be viewed as a simple contract controversy and that when so viewed petitioners' claims that federal legislation has been nullified and important questions of federal law thereby raised are mere pretense. This is sophistry. *Public Law 1026—84th Congress* removed the automobile dealer franchise agreement from the field of simple contract law by introducing the concept of good faith into the franchise relationship as a matter

of national policy in order to proscribe the type of judicial construction indulged below. The persistence of the court below, in spite of the Act, in resorting to a type of construction of the agreement which had historically frustrated the dealer amounted to a nullification of the Act itself and cannot be viewed as a matter of simple contract controversy.

It is clear from *House Report No. 2850—84th Congress, 2d Session*, that an interpretation of the automobile franchise that it provides that the dealer shall perform to the satisfaction of the manufacturer and that the question of satisfaction is for the manufacturer alone to determine was the type of interpretation which the Act sought to proscribe (Appendix to Petition, pp. 28a-31a). Yet it is precisely such an interpretation of the franchise agreement indulged by the court below which is the indispensable predicate of its judgment that as a matter of law the petitioners, upon respondent's professed dissatisfaction, sincere or not, became obligated to move the dealership, and the failure to do so amounted to a breach of the agreement and the demands of respondent that they do so on threat of termination and its termination of the agreement when they did not so respond did not as a matter of law constitute a failure to act in good faith within the purview of *Public Law 1026—84th Congress*.

Respondent asserts that the court below did not predicate its decision that as a matter of law there was no violation of the Automobile Dealers Act on such interpretation. This is not so. The opinion of the court below is clear and admits of

no argument on this score. The decision affirmatively holds (Appendix to Petition p. 11a) that the question of satisfaction was for the respondent alone and the reasonableness of its satisfaction was not open to question except for fraud. The court then proceeds to hold that respondent professed dissatisfaction with the place of business; that thereupon it became obligatory upon petitioners under the agreement to provide other facilities; that accordingly respondent's demands that such other facilities be provided on threat of termination, and its termination of the agreement on petitioners' failure to respond, could not as a matter of law constitute failure to act in good faith within the purview of *Public Law 1026—84th Congress.* Indispensable to its conclusion was its basic determination that the question of satisfaction was for respondent alone and the reasonableness of its satisfaction was not questionable except for fraud.

No provision of the franchise agreement prescribed satisfaction in the sole judgment of respondent. Petitioners contended that respondent's professed dissatisfaction was not in good faith. There was no evidence in the record that respondent was in good faith dissatisfied. There was no evidence in the record that the premises were not in fact satisfactory and adequate. There was evidence in the record that the premises were satisfactory in appearance and location both in fact and in the judgment of respondent. Respondent admitted it had approved the premises as satisfactory in appearance and location for the operation of the Buick dealership. Certainly it could not be heard credibly to say that the premises were not satisfactory as to appearance and location

for the sale of its equally fine Chevrolet automobiles. There was evidence in the record that the premises were adequate as to size and layout for the operation of the Chevrolet dealership. Respondent had approved the premises for the operation of the Buick dealership. The petitioner B. J. Woodard testified (R. p. 306) that he could handle 1000 cars per year with a building of the same square footage as the Stonewall Street premises. This was a volume far in excess of the combined Chevrolet and Buick operations. Respondent in signing the franchise agreement approved the premises for the location of the Chevrolet dealership for at least such time as it should take to ascertain a location with access on the new super-highway and complete the construction of a building thereon, a time then clearly foreseen to be years in the future. This was evidence from which a reasonable inference could be drawn that the professed dissatisfaction of respondent with the premises was not in good faith. The issue of good faith is a question for the jury. *Isbell v. Anderson Carriage Co., Supreme Court Michigan, 170 Mich. 304, 136 N. W. 457; Hatfield v. Barnes, Supreme Court Colorado, 168 P. 2d 552; Sriggum v. Phillips, 217 Minn. 586, 15 N. W. 2d 109; Bauer v. Nevzill, 66 Cal. App. 2d Supp. 1020, 152 P. 2d 47.* Yet the court below in passing upon the alleged violation of the Automobile Dealers' "Day in Court" Act, adopted by Congress for the purpose of assuring the dealer an opportunity to secure a judicial determination *irrespective of the contract terms* as to whether the automobile manufacturer has failed to act in good faith in terminating the franchise, denied petitioners, on disputed facts from which a

reasonable inference of bad faith could be drawn, the right to have the jury which petitioners demanded pass upon that ultimate factual issue.

Respondent clearly demonstrates the basic error of its position and the decisions of the courts below throughout its brief. It postulates its entire argument upon the indispensable premise that the satisfaction and adequacy prescribed for the place of business by the franchise was satisfaction in its sole judgment unquestionable except for fraud, and that its expressed dissatisfaction with the premises obligated petitioners under the contract to move and that petitioners' failure to move constituted a breach of the contract which authorized respondent to demand the move on threat of termination, and to terminate the franchise for failure to respond and immunized its actions in that regard from any violation of *Public Law 1026—84th Congress*. On the basis of that erroneous proposition respondent argues that there are no disputed material fact issues and summary judgment was proper. Respondent ignores the real existence of disputed issues of material fact on t' question of its good faith in professing dissatisfaction with the premises, on the question of the satisfaction and adequacy of the premises in fact, and, if they were obligated at all to move, on the questions of whether petitioners made reasonable efforts to acquire other premises and whether a reasonable time to do so had expired.

Respondent makes assertions in its brief which are not accurate as to matters in the record. Respondent asserts that it was unconditionally stipulated that the respondent was never satisfied with the location of the dealership in

the Stonewall Street location and suggests that petitioners indulged in a cavalier treatment of the record in contending otherwise. The record speaks for itself (R. p. 148):

> "The Court: It is stipulated that the defendant General Motors was itself never satisfied with the location of the dealership in the Stonewall Street location. In this connection the plaintiff contends that the defendant's satisfaction was not in good faith. Is that right?
>
> "Mr. Fonville: That is right."

Petitioners' stipulation was on the condition stated by the court and clearly did not extend to a stipulation that General Motors was in good faith dissatisfied.

Respondent asserts that a recognition by petitioners at the time of the signing and delivery of the contract that the Stonewall Street facilities were not satisfactory is evidenced by the pretrial stipulation that:

> "At the time of the signing and delivery of the Franchise Agreement * * *. Executed and delivered May 28, 1956, it was understood between plaintiff and the defendant that the Stonewall Street premises were not to be the permanent dealership location (R. p. 149)."

This, of course, obviously does not evidence a recognition by petitioners that the premises were in fact not satisfactory. The quotation, moreover, does not fairly present the conditions of the stipulation. The colloquy in which the stipulation occurred was as follows:

> "The Court: At the time of the signing and delivery of the Franchise Agreement dated May 28, 1956—
>
> "Mr. Johnson: Not dated, Judge.

"The Court: Executed, Pardon me. Executed and delivered May 28, 1956, it was understood between plaintiff and the defendant that the Stonewall Street premises were not to be the permanent dealership location.

"Wait.

"(Discussion off of the record.)

"The Court: Add that there: The plaintiff makes the contention that the merger clause in the contract bars the receipt in evidence of this understanding and agreement—makes this understanding and agreement of no legal effect. That is right?

"Mr. Fonville: That is right.

"(Discussion off of the record.)

"Plaintiff contends that the agreement was—

"Mr. Fonville: That the agreement, if the court please, with the same reservation, was that as soon as they could ascertain a location on the new highway from which ingress and egress could be certain they could obtain a location there and begin the construction of a new building or—

"The Court: All right.

"Mr. Fonville: —or they would if they found other suitable facilities, they would find other suitable facilities, but they had at least the time to obtain the further option.

"The Court: They had at least until they could ascertain from the State Highway Department whether they could attain ingress and egress to the new state highway."

Respondent challenges petitioners' claim that respondent's letter of August 22, 1956 to petitioners "recorded its understanding of the oral representations made to it at the time

of its execution and delivery" of the contract on May 28, 1956, that petitioners had the "option" to "begin construction of a new building as soon as the right of way was determined or meanwhile provide other suitable facilities", and that the time within which to begin construction had not expired at the time of respondent's termination of the contract and says categorically that all three assertions are contrary to the record; that the letter was written three months after the execution of the contract and contains no reference to the contract or the meeting at which it was delivered and petitioners' own testimony with respect to the meeting contains no reference to any such option (R. pp. 187-8); that the location and right-of-way of the new highway had, in fact, been determined prior to petitioners' only visit to the Highway Department in March or April, 1957, and only the fences along and access to the highway remained subject to possible change (R. pp. 326-7). Respondent is careless and captious. Petitioner B. T. Woodard testified that he recalled only one time talking to Alley, respondent's zone manager in his office in Dallas, and that was when he signed his franchise agreement. He identified Alley's letter of August 22, 1956 (R. p. 186) and stated that he told Alley as stated in that letter, that it was petitioners' "plan to eventually improve the facilities either by a new location on the highway, and as quickly as the highway is determined, and by obtaining other facilities that would be satisfactory (R. pp. 186-87)". This occurred in the morning session of the deposition. Immediately after the noon recess (R. pp. 187-88) respondent's counsel continued his examination as to the meeting in Alley's

office at which the franchise agreement was signed and adduced from the witness the statement that Alley had asked him if he would sign a letter that as soon as it was available or he could find a place that suited him he would make a move and that he had stated he would and Alley had said his word was good and signed the contract. Counsel then asked if that, plus what the witness had testified during the morning session, was that Alley had said to the witness and the witness had said to Alley. The witness replied in the affirmative (R. p. 188). Certainly at a time when the State Highway Department advised not purchasing property for business depending upon the highway because of possible changes in plans which would prohibit access to the highway, the right-of-way could not reasonably be said to have been determined within the purview of an agreement to begin construction of a new building to house an automobile dealership as soon as the right-of-way was determined.

Respondent in a footnote at page 28 of its brief asserts that the record contained no evidence of adequacy of the premises and detailed evidence of the reasons for the inadequacy of the Stonewall Street premises. It cites the fact that the move the two dealerships were in a building containing 10,000 square feet under roof, whereas the Stonewall Street and Lee Street premises together contained 25,000 square feet, and the total show room space and service stalls were reduced as was the total monthly rental. This would not constitute evidence of inadequacy absent a showing that the greater space and larger number of stalls were

required. Petitioner B. J. Woodard testified (R. p. 306) that he could handle a volume of 1000 car sales per year, a much larger volume than the combined Buick and Chevrolet operation, in a building containing 10,000 square feet under roof. Respondent in signing and delivering the franchise agreement approved the occupancy of the Stonewall Street premises for at least such time as required to locate a building site with access on the new super-highway and construction of a building thereon, a time then clearly foreseen to extend years in the future.

It is curious to note that in its argument respondent lays so much stress on what it denominates "the unauthorized move" of the Chevrolet dealership by petitioners from the Lee Street premises to the Stonewall Street premises. This move occurred two months prior to the time when respondent with full knowledge of the move and the location of the Chevrolet dealership in the Stonewall Street premises along with the Buick dealership signed and delivered the franchise agreement to petitioners.

Respondent draws inferences from facts in the record that, if obligated to do so, petitioners might have made greater and more effective efforts to locate other facilities for the dealership and that a reasonable time to do so had elapsed. The record contained facts, however, from which reasonable inferences could have been drawn that reasonable efforts had been made and a reasonable time had not expired. Respondent's argument was for the jury which petitioners were erroneously denied.

The Automobile Dealers Act, as respondent suggests, does not, and was not intended to, prohibit the manufacturer from terminating the franchise of a dealer who is not providing the manufacturer with adequate representation. The Act does not curtail the manufacturer's right to cancel an inefficient or undesirable dealer's franchise or freeze present channels of distribution. It was, however, clearly intended to, and does, introduce an important element into the franchise relationship; that is the concept of good faith, the duty to act in a fair and equitable manner in terminating a franchise agreement. Respondent would have it that breach by the dealer in its judgment of a provision of the franchise agreement requiring performance by the dealer to the satisfaction of respondent in its sole judgment immunizes respondent from a charge of violation of the Automobile Dealers Act, whether its judgment be reasonable or not. If that were the case *Public Law 1026—84th Congress* would have added nothing to the franchise relationship. That law did add to that relationship the concept of good faith. That law at the very least requires that respondent's judgment as to satisfaction of dealer's performance be reasonable and based on cause, not on caprice. That law was passed to assure the dealer of a day in court to have a judicial determination, irrespective of the contract terms, of whether respondent's judgment was fair and equitable and, accordingly, in good faith, or arbitrary and capricious and, accordingly, in bad faith. The day in court accorded the dealer by the Act extends to a judicial determination by a jury of the ultimate fact issue of good faith where there are any facts in the

record from which an inference of a failure to act in good faith may reasonably be drawn. There are such facts in the record here. The summary judgment was improvident.

CONCLUSION

It is clear that this case poses questions of national importance; that by the erroneous decision below the purpose of *Public Law 1026—84th Congress* has been frustrated, and that to affirm the summary judgment the court below, in conflict with applicable decision of this court and accepted and usual standards of judicial proceedings, ignored the existence of substantial disputed issues of material fact and denied petitioners the right of judicial determination by jury of whether respondent acted in good faith within the purview of *Public Law 1026—84th Congress* in terminating the franchise. The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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PROOF OF SERVICE

I, Irving L. Goldberg, attorney for petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the day of May, 1962, I served copies of the foregoing Reply Brief of Petitioners on the respondent by mailing copies in a duly addressed envelope, with first-class postage prepaid, to Mr. Ira Butler, W. T. Waggoner Building, Fort Worth, Texas, and Mr. Charles L. Stephens, Cantey, Hanger, Johnson, Scarborough and Gooch, First National Building, Fort Worth, Texas, attorneys for respondent.

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